

**KENTUCKY PERSONNEL BOARD
MINUTES OF MAY 13, 2016**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Vice Chairman Larry Gillis on May 13, 2016, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Larry B. Gillis, Vice Chairman
David B. Stevens, Member
Amanda Cloyd, Member
Brian J. Crall, Member
Mark O. Haines, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Cynthia Perkins, Administrative Section Supervisor
Gwendolyn McDonald, Administrative Specialist

Board Personnel Absent:

D. Brian Richmond, Member

Swearing in of newly elected Board members

The newest Board Member, Mark O. Haines, appointed by Governor Matthew G. Bevin, was sworn in prior to the beginning of the meeting. The oath of office was administered by Boyce A. Crocker, General Counsel.

2. **READING OF THE MINUTES OF REGULAR MEETING HELD APRIL 15, 2016**

The minutes of the last Board meeting had been previously circulated among the members. Chair Gillis asked for additions or corrections. Mr. Crall moved to approve the minutes; as submitted. Ms. Cloyd seconded and the motion carried 5-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek stated that the annual Kentucky Association of Administrative Adjudicators (KAAA) Training was held on April 29, 2016. Mr. Sipek stated that he, Mr. Crocker, and several hearing officers attended the training. Mr. Sipek stated that Ms. Linda House, of the Kentucky Employee Mediation Program (KEMP), was a presenter.

Mr. Sipek stated that included in the Board's packet is an Opinion and Order in Shena Back v. Justice and Public Safety Cabinet, Department of Corrections, 2013-CI-00691. The Franklin Circuit Court affirmed the Board's Final Order dismissing the appeal.

Mr. Sipek announced that the Personnel Board was in good shape for Fiscal Year 16, which ends June 30, 2016. The Board has enough funds to continue hearing cases by the hearing officers, as in the past the Board had run out of funds. In response to Chair Gillis' question concerning renewal contracts for Hearing Officers, Mr. Sipek stated that the Fiscal Years 17 and 18 contracts are being processed.

At the conclusion of Mr. Sipek's report, Chair Gillis called for the Personnel Cabinet's report.

4. **PERSONNEL CABINET'S REPORT**

Secretary Thomas Stephens, the Hon. Lesley Bilby and Commissioner Mary Elizabeth Bailey were present for the Personnel Cabinet's report.

Secretary Stephens introduced a few members of his staff: Chris Lewis, Director of the Office of Employee Relations, working with Workers Compensation; Greg Ladd, Attorney in Legal Services; and Chris Johnson, Executive Director of Diversity and Equality. He stated that Linda House, along with Chris Lewis, will conduct mediator training in June.

Secretary Stephens handed out a memo to the Board members concerning personnel restrictions concerning budget issues (i.e. Block 50 – comp time and overtime). One goal is to reduce manipulation by employees forcing payouts of Block 50s, by using annual time instead of comp time for time off. Commissioner Bailey added that the Cabinet is taking a more heightened approach with the new administration to ensure everyone is aware and fiscally responsible with the resources that are available, and to ensure employees are not working additional time without critical need or without prior approval. Secretary Stephens stated that a requirement for the agencies is to send a memo to the Cabinet and the Budget Director for any employee getting a Block 50. Although the Personnel Cabinet is capable of pulling that data and running the report themselves, if the agencies are required to provide the reports it affords more awareness.

Secretary Stephens discussed the memorandum from Commissioner Bailey regarding Requests for Merit Hiring Actions. On December 23, 2015, Governor Bevin had issued an Executive Order basically getting rid of exemptions to the hiring freeze. Secretary Stephens stated that the hiring process in the past allowed a list of names and positions (after the position was advertised) to be given to the Governor's office. This process provided too much information to high level political people in the Governor's office and there was no reason for it. The Personnel Cabinet came up with a system and a form that agencies must follow before a position is advertised. Secretary Stephens stated that he would like to see this process memorialized in an Administrative Regulation.

Mr. Crall added that in the past the Governor's office could "work around" the hiring process. If the lists of names and positions matched a name on a list the Governor's office had in place, the position would be approved. If it did not match a name, the position would be disapproved. Mr. Crall stated that this issue had been brought to the Personnel Board's attention during his tenure, but the Board lacked the resources to investigate.

Secretary Stephens added that salary was the biggest challenge the Cabinet had in maintaining a competitive workforce. Commissioner Bailey stated that the last time the salary scale was adjusted was in 2007.

Chair Gillis stated that filling out the form is not that simple because the agencies really have to justify the position, or it is rejected. The agencies have to adjust to this new process. Secretary Stephens stated that this process is paperless, it is all electronically tracked.

Mr. Crall stated he re-familiarized himself with KRS Chapter 18A and there is a limit of state employees to 33,000. Secretary Stephens stated the number was below the limit at approximately 32,000 employees. Ms. Bailey stated that this number (33,000) is limited to permanent full-time employees, and does not include part-time or interim employees. Mr. Crall asked, with a growing state population, increasing demands on state government, more work required of fewer people, and with restrictions on overtime (particularly Block 50s), if the Cabinet is looking globally into contracts?

Secretary Stephens gave an example of a contract they are reviewing. Secretary Stephens stated that KHRIS is a sophisticated program, with about 19 terabytes of data that includes health insurance overlay. The Cabinet is paying through a COT contract approximately \$5 a gigabyte, while the commercial rate is a fraction of that.

Mr. Crall asked if there was an analysis of KRS Chapter 18A and whether there is any interest in updating it. For example, the employee 5 percent pay raise is still law, a benefit employees do not have access to.

Secretary Stephens is working on a reorganization package. One idea is the creation of an ombudsman, along with mediation, to solve problems before getting appealed to the Personnel Board. There is evidence of senior, non-merit staff being paid and were not there. Had there been a better way to identify that issue, we would not be where we are today. Secretary Stephens is keeping an on-going list of housekeeping things to do, that is, best practices.

Mr. Crall stated that whether Democrat or Republican, any analysis of the merit system would appear politically motivated. Mr. Sipek stated that in 2007, the Board carefully looked at KRS 18A and made recommendations; the end result it was viewed as too political. The most significant change was Representative Cherry's bill that started with the Blue Ribbon Panel, which went through in 2010. Nothing significant has been done since then.

Secretary Stephens stated that he would like to invite the Board in June or July to visit the Personnel Cabinet.

Mr. Crall asked if, due to the news coverage of Secretary Longmeyer and the fact the Cabinet has a statutory obligation to investigate KRS 18A, the coercion of non-merit employees to make contributions, did it reach the level of merit employees? Secretary Stephens stated that he did not have any specific information on that. He has not made any attempt to look into political contributions of merit employees, but has found many interesting things since then. He is surprised nobody has brought up the Personnel Board. Secretary Stephens stated that pursuant to KRS 18A.140 the Personnel Board has jurisdiction to investigate. Mr. Crall stated that if the Cabinet hears of anything that needed to be looked into to contact the Board. Secretary Stephens stated that investigations, specifically by the Executive Branch Ethics Commission, are totally confidential. Secretary Stephens stated that the Cabinet is cooperating fully with all on-going investigations.

Secretary Stephens stated that the Personnel Cabinet can ask the Board to do an investigation, but also the Board can do a *sua sponte* investigation. Secretary Stephens stated that he would cooperate with any investigation. Chair Gillis stated that 5 out of 200 merit employees were identified as giving small contributions, as reported by the Kentucky Center for Investigating Reporting. As it pertains to non-merit employees, Secretary Stephens stated that report was incorrect; it was more than 25 out of 32 non-merit employees. Donations were being made to the Democratic Party on a federal level, which are not reported at the state level.

One last point, Chair Gillis added the frustration employees feel during budget, the employees are left out. Employees have not received 5 percent merit increases since 2002, and employees still ask about it.

Secretary Stephens stated that with respect to the hiring freeze, 24-hour facilities are exempted, i.e. correctional officers, nurses.

5. ORAL ARGUMENTS

Teresa Hall v. Finance and Administration Cabinet/Revenue

Present for oral arguments were the Appellant, Teresa Hall, via telephone and counsel for Appellee, the Hon. Cary Bishop. After presenting oral arguments, the parties answered questions from the Board.

6. **CLOSED SESSION**

Dr. Stevens moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Mr. Haines seconded. Chair Gillis stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 5-0. (10:48 a.m.)

Dr. Stevens moved to return to open session. Ms. Cloyd seconded and the motion carried 5-0. (11:15 a.m.)

7. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. **Teresa Hall v. Finance and Administration Cabinet/Revenue
(2015-111, 2015-165 & 2015-191)**

Ms. Cloyd, having noted Appellee's exceptions and oral arguments, moved to accept the Final Order altering the recommended order, as attached to the minutes, dismissing the appeals. Mr. Crall seconded and the motion carried 5-0.

B. **Dawn M. Wilkerson v. Justice and Public Safety Cabinet/Juvenile Justice
(2014-197)
Deferred from April Board**

Ms. Cloyd, having noted Appellee's exceptions and Appellant's response, moved to accept the Final Order altering the recommended order, as attached to the minutes, dismissing the appeal. Mr. Crall seconded and the motion carried 5-0.

C. **Shawn Cary v. Transportation (2015-271)**

Ms. Cloyd moved to accept the recommended order dismissing the appeal. Mr. Crall seconded and the motion carried 5-0.

D. **Stephen Eastin v. Tourism, Arts and Heritage Cabinet/Parks (2015-261)**

Mr. Haines moved to accept the recommended order dismissing the appeal, with clerical correction. Mr. Crall seconded and the motion carried 5-0.

E. **Matt True v. Transportation Cabinet (2015-175)**

Mr. Crall moved to accept the recommended order sustaining the appeal. Ms. Cloyd seconded and the motion carried 5-0.

8. **Show Cause Orders – No Response Filed – Appeals Dismissed**

Dr. Stevens moved to find that the Appellants had not responded to the show cause orders and that the recommended orders be accepted dismissing the appeals for failure to timely prosecute the appeals. Ms. Cloyd seconded and the motion carried 5-0.

- A. Lona Taylor v. Justice and Public Safety Cabinet/Corrections (2015-229)
- B. John McNees v. Transportation Cabinet and Personnel Cabinet (2015-327)

9. **WITHDRAWALS**

Mr. Crall moved to accept the following withdrawal of appeals *en bloc* and to dismiss the appeals. Dr. Stevens seconded and the motion carried 5-0.

- A. Ursula Johnson v. Cabinet for Health and Family Services (2015-174)
- B. Jeff Kaiser v. Finance and Administration Cabinet (2016-012)
- C. Ronyeld Shirley v. Justice and Public Safety Cabinet/Corrections
(2016-005 and 2016-013) (2 appeals)


10. **SETTLEMENTS**

Mr. Crall moved to issue settlement orders and to sustain the appeals *en bloc* to the extent set forth in the settlements as submitted by the parties. Dr. Stevens seconded and the motion carried 5-0.

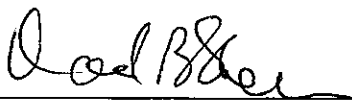
- A. Sarah Whittington v. Department of Veterans Affairs (2016-062)
- B. Alton "Tommy" Tichenor v. Department of Agriculture (2016-025) (Mediated)

11. **OTHER**

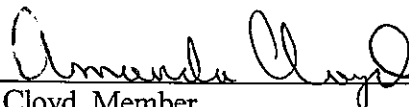
There being no further business, Mr. Haines moved to adjourn. Dr. Stevens seconded and the motion carried 5-0. (11:20 a.m.)



Larry Gillis, Vice Chairman



David B. Stevens, Member


Amanda Cloyd, Member


Brian J. Crall, Member


Mark O. Haines, Member

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2015-111, 2015-165 and 2015-191**

TERESA G. HALL

APPELLANT

**FINAL ORDER
ALTERING HEARING OFFICER'S
VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

FINANCE AND ADMINISTRATION CABINET

APPELLEE

*** **

The Board, at its regular May 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 24, 2016, and having considered Appellee's exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered, as follows:

A. **Delete** Finding of Fact number 14 and substitute the following:

14. The purpose of having placed Appellant on directed sick leave, according to Ms. Barker, was to ensure Appellant's safe return to work, after receiving information from Appellant's treating physician on steps the Cabinet should take "beyond measures already in place." The conflicting written statements provided by Dr. Roach, the second having been based on direct instructions from Appellant (Appellee's Exhibits 25 and 26), coupled with Appellant's refusal to have allowed direct communication between her employer and her treating physician, substantiated the grounds for Appellee having placed Appellant on directed sick leave. The Appellee, therefore, has demonstrated, by a preponderance of the evidence, that placing Appellant on directed sick leave at that time was done with just cause and was neither excessive nor erroneous.

B. **Delete** Conclusion of Law number 5, and substitute the following:

5. After examination of the deposition testimony of Dr. Roach, it is clear that the Cabinet has taken steps prior to this hearing, to provide the type of reasonable accommodations recommended by the doctor.

C. Delete the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeals of **TERESA G. HALL V. FINANCE AND ADMINISTRATION CABINET (APPEAL NOS. 2015-111, 2015-165 and 2015-191)** are **DISMISSED**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeals are **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of May, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Cary B. Bishop
Ms. Teresa Hall
Ms. Honor Barker

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-197**

DAWN M. WILKERSON

APPELLANT

**FINAL ORDER
ALTERING HEARING OFFICER'S
VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF JUVENILE JUSTICE**

APPELLEE

** ** *

The Board at its regular May 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 22, 2016, having noted Appellee's exceptions, Appellant's response to exceptions and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered, as follows:

A. **Delete** Finding of Fact number 14(D) and substitute the following:

D). THE DEPARTMENT HAD REASON TO KNOW OF APPELLANT'S DISABILITY.

Commissioner Hayter testified he rescinded Appellant's job offer because of her two prior DUIs. His testimony made it clear that it was only jobs involving driving that he felt she was unsuitable for. Hayter considered Appellant's two prior DUI convictions to render her unacceptable for the CPA position – which involves driving. The Board rejects any finding that Hayter specifically considered Appellant to be an alcoholic, but does find that Hayter reasonably should have known from Appellant's DUI

convictions and also from his discussions with Kevin Warford, that Appellant might have had a disability, and certainly Hayter had reason to know of this.

B. **Delete** Finding of Fact number 19 and substitute the following:

19. The Board finds that Commissioner Hayter did believe that Appellant's two DUIs demonstrated poor judgment, and finds that Commissioner Hayter was legitimately concerned about extending a job offer to Appellant (with previous DUIs) when the job involved driving. The Board finds the Appellee met its burden of proof to show a legitimate, non-discriminatory reason for rescinding Appellant's conditional job offer.

C. **Delete** Findings of Fact number 22, 23 and 24 and substitute the following:

22. The Board finds credible evidence presented by Commissioner Hayter that he would not hire someone with a record of two or more previous DUIs.

23. The Board finds that while there may be persons employed by DJJ with DUIs, the Board specifically finds that in this instance, Commissioner Hayter decided for legitimate reasons to rescind the offer of employment to Appellant due to her previous DUI convictions. The Board finds this appeal is about the Appellant and not other unnamed individuals who were apparently currently working at DJJ with DUIs. No facts were introduced as to the circumstances of their hire, thus, it is not appropriate to further consider such.

D. **Delete** the Conclusions of Law and substitute the following:

The Board concludes the Appellee, Department of Juvenile Justice, met its burden in showing a legitimate, non-discriminatory reason for rescinding Appellant's conditional

job offer as stated in the Findings of Fact, above.

B. Delete the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **DAWN M. WILKERSON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2014-197)** is **DISMISSED**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of May, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. William F. Codell
Hon. Ben Basil
Grace Smith